

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36400

STATE OF IDAHO,)	2010 Unpublished Opinion No. 308
)	
Plaintiff-Respondent,)	Filed: January 11, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
KENNETH M. WORKMAN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Order denying I.C.R. 35 motion for correction of illegal sentence, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

Before LANSING, Chief Judge; GRATTON, Judge;
and MELANSON, Judge

PER CURIAM

Kenneth M. Workman pled guilty to two counts of aggravated driving under the influence, Idaho Code § 18-8006, and a charge of being a persistent violator, I.C. § 19-2514. Workman had driven his vehicle off the Interstate and into two pickup trucks parked on the side of the road causing serious injury to two people, at which time Workman was under the influence of heroin, methamphetamine and THC. *Workman v. State*, 144 Idaho 518, 521, 164 P.3d 798, 801 (2007). The district court sentenced Workman to two determinate life sentences which this Court affirmed on appeal. *State v. Workman*, Docket No. 28864 (Ct. App. July 1, 2004) (unpublished).

In April 2009, Workman filed a motion to correct illegal sentence pursuant to Idaho Criminal Rule 35. In his Rule 35 motion, Workman asserted that his conviction and sentence are

illegal, contending that his aggravated DUI sentences violate double jeopardy because both “counts arose from a single act.” Prior to the State filing its response on the merits of the motion, the district court denied the motion as untimely. Pursuant to Rule 35, the district court may correct an illegal sentence at any time. Thus, to the extent Workman’s Rule 35 motion is actually based upon an “illegal sentence,” the motion was timely. In an appeal from the denial of a motion under Rule 35 to correct an illegal sentence, the question of whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court. *State v. Josephson*, 124 Idaho 286, 287, 858 P.2d 825, 826 (Ct. App. 1993); *State v. Rodriguez*, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991).

In *State v. Clements*, ___ Idaho ___, ___ P.3d ___ (2009), the Supreme Court indicated that an “illegal sentence” under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record and does not raise significant questions of fact or require an evidentiary hearing. Workman waived all non-jurisdictional defects and defenses, including double jeopardy violations by pleading guilty. *State v. Salinas*, 134 Idaho 362, 367, 2 P.3d 747, 752 (Ct. App. 2000). Further, even if the motion were considered to raise an illegal sentence under Rule 35, the claimed illegality fails as a matter of law in light of this Court’s decision in *State v. Turney*, 147 Idaho 690, 214 P.3d 1169 (Ct. App. 2009). This Court may affirm a lower court in application of the correct theory. *State v. Avelar*, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997). The district court’s order denying Workman’s Rule 35 motion is affirmed.